Supreme Court, U. S.
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No. 79-1902

In the Supreme Court of the United States

OCTOBER TERM, 1979

JEAN C. ROSENBAUM, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner challenges the constitutionality of Section 71(a)(3) of the Internal Revenue Code of 1954 (26 U.S.C.) which taxes the spouse who receives support payments made under a court decree even though there is no ultimate divorce or separate maintenance decree. She also claims that it was unconstitutional to tax her as a married person filing separately while allowing her husband, who had left her and who provided the home for the children, to be taxed as a head of household. Finally, petitioner seeks review of the Tax Court's dismissal of her petition for a redetermination of a deficiency for 1974 on the ground that she failed to file a timely petition.

The pertinent facts may be summarized as follows: In 1972, petitioner's husband, Kurt Rosenbaum, who had been living apart from her since 1965, filed a petition for

divorce (Pet. App. 6). During the pendency of the contested divorce suit, he was ordered to pay petitioner temporary alimony in the amount of $25 per week. During 1973, petitioner received $1,475 in alimony payments, of which $175 represented late payments attributable to 1972 and $1,300 represented payments for 1973 (Pet. App. 7). In 1974, the state trial court entered a judgment of divorce. After the judgment of divorce was reversed on appeal and the case was remanded, the petition for divorce was eventually dismissed. Petitioner has never filed suit for separate maintenance, legal separation, or divorce (Pet. App. 7-8).

On her 1973 federal income tax return, petitioner included in her gross income the $1,475 of temporary alimony she received. She claimed her filing status for determining the appropriate tax rates under Section 1 of the 1954 Code as both "single" and "married filing separately," and then computed her tax based on the rates applicable to single individuals (Pet. App. 5). On audit, the Commissioner of Internal Revenue determined a deficiency of $72.50, based upon tax rates applicable to a married individual filing separately instead of the rates for single individuals used by petitioner (Pet. App. 8).

Petitioner thereafter filed an amended return which claimed a refund by excluding the temporary alimony from her gross income. The Commissioner agreed to reduce the amount of alimony included in her gross income for 1973 to $1,300 (Pet. App. 3). The decrease in gross income resulted in a small adjustment, which reduced the deficiency to $31 (Pet. App. 2).

In this action brought by petitioner for redetermination of the deficiency, the Tax Court held that the temporary alimony was includable in petitioner's gross income, that she was not entitled to claim single status on her federal income tax return, and that the applicable statutory

provisions are constitutional (Pet. App. 8-13). The Tax Court also dismissed a petition for redetermination of a deficiency in petitioner's 1974 federal income tax on the ground that it lacked jurisdiction (Pet. App. 14). The court of appeals affirmed (Pet. App. 2-4).

1. The decision below correctly held that the temporary alimony received by petitioner is includable in her gross income and that the provision of the Internal Revenue Code requiring such treatment is constitutional. Section 71(a)(3) of the Code provides that gross income includes periodic support payments received from a spouse under a court decree. The rule of Section 71(a)(3) does not require a legal separation or final decree of divorce. Treasury Regulations on Income Tax (1954 Code), Section 1.71-1(b)(3)(i) (26 C.F.R.); *Korman* v. *Commissioner*, 36 T.C. 654 (1961), aff'd per curiam, 298 F. 2d 444 (2d Cir. 1962); *Kirby* v. *Commissioner*, 35 T.C. 306 (1960).

It is undisputed that petitioner received $1,300 in temporary alimony in 1973 from her husband pursuant to a court order. Accordingly, the court of appeals correctly held that those payments must be included in her gross income. Contrary to petitioner's argument (Pet. 2, 13-15, 18-19), the constitutionality of Section 71(a)(3) and its predecessor has been consistently upheld. *Fairbanks* v. *Commissioner*, 191 F. 2d 680 (9th Cir. 1951), cert. denied, 343 U.S. 915 (1952); *Mahana* v. *United States*, 88 F. Supp. 285 (Ct. Cl.), cert. denied, 339 U.S. 978 (1950); *Shomaker* v. *Commissioner*, 38 T.C. 192 (1962); *Neeman* v. *Commissioner*, 26 T.C. 864 (1956), aff'd per curiam, 255 F. 2d 841 (2d Cir.), cert. denied, 358 U.S. 841 (1958). The intent of Congress was to have the incidence of taxation fall on the spouse who actually had dominion and control over funds received. That is certainly a rational legislative choice, and the point where payment of support is made pursuant to court order is a rational

demarcation with respect to the incidence of taxation. Accordingly, Section 71(a)(3) does not violate petitioner's right to due process or equal protection of the laws. See *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970).

2. Petitioner further argues (Pet. 12-14) that the decision below unconstitutionally forces her to file her income tax return using the rates applicable to married individuals filing separate returns, instead of using the rates for single individuals. Under Section 143(a)(2) of the 1954 Code, a married individual remains married for federal tax purposes unless the individual is legally separated from her spouse under a decree of divorce or separate maintenance. Petitioner was not separated from her husband in 1973 under a decree of divorce or separate maintenance (Pet. App. 11). Moreover, petitioner does not qualify for treatment as an unmarried individual under Section 143(b) of the Code, because she does not provide a home for at least one dependent and is therefore not entitled to use the rates for heads of households provided in Section 1(b) of the 1954 Code (Pet. App. 11). The constitutionality of the classification of taxpayers for tax rate purposes on the basis of marital status has recently been upheld. *Johnson* v. *United States*, 422 F. Supp. 958, 974-975 (N.D. Ind. 1976), aff'd, 550 F. 2d 1239 (7th Cir. 1977), cert. denied, 434 U.S. 1012 (1978). The fact that petitioner's husband qualified for head of household rates provides no support for her claim that she is entitled to those rates as well.

3. Finally, the Tax Court correctly dismissed petitioner's petition for a redetermination of a deficiency for 1974. In the court of appeals, petitioner acknowledged that she received the notice of deficiency for 1974.[1] Moreover, the record in the Tax Court established that the deficiency notice was properly sent by certified mail

on February 4, 1976, in accordance with Section 6212 of the Code (Commissioner's Motion to Dismiss in the Tax Court, Exh. B).[2] Pursuant to Section 6213(a) of the Code, petitioner had 90 days from the date the notice was mailed to file a petition with the Tax Court. Her petition for 1974 was not filed with the Tax Court, however, until July 12, 1977, 522 days after the notice of deficiency was mailed (Tax Court Order, September 15, 1977). As a result, the Tax Court had no jurisdiction over her claim for 1974.[3]

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE JR.
Solicitor General

JULY 1980

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[1]See page 15 of petitioner's brief in the court of appeals. For the convenience of the Court, we are lodging a copy of the brief with the Clerk.

[2]A copy of the Commissioner's Motion to Dismiss in the Tax Court has been lodged with the Clerk.

[3]Petitioner argued below (Pet. Br. 15) that the deficiency notice for 1974 was not sent by certified mail. Petitioner under the heading of "2. *1974 INCOME TAX*," states (Pet. 17; emphasis in original) that the deficiency notice for "taxable year *1973* was *not* sent by registered mail" in accordance with Section 6212 of the 1954 Code. We assume that petitioner intended to address her remarks to taxable year 1974. Whether the deficiency notice for 1973 was properly mailed in accordance with Section 6212 was not raised before the courts below and is not an issue properly before this Court. In any event, a defect in mailing, if it existed, would not give the Tax Court jurisdiction.